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Summary of Argument.

I.

Under the Federal Employers' Liability Act, there must be a showing of actionable negligence on the part of defendant amounting to more than a mere scintilla before a cause may properly be submitted to the jury. In the case at bar, the evidence was insufficient to justify a finding that petitioners violated any duty which they owed to respondent. The Circuit Court of Appeals for the Eighth Circuit should, therefore, have reversed the case on the ground that there was no showing of actionable negligence 10

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. .....

JOSEPH B. FLEMING AND AARON COLNON, TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Petitioners,*

vs.

EVERETT E. HUSTED, *Respondent.*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioners Joseph B. Fleming and Aaron Colnon, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, respectfully show to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Respondent instituted this action under the Federal Employers' Liability Act in the United States District Court for the Southern District of Iowa against Petitioners (bankruptcy trustees for The Chicago, Rock Island and Pacific Railway Company) for the recovery of damages for personal injuries alleged to have been sustained by respond-

ent while employed by petitioners in the capacity of a freight train brakeman.

The evidence upon the trial disclosed that respondent, an experienced brakeman, having some twenty-three years of service with petitioners and their predecessor railway company, on June 23, 1943, was the rear brakeman on a freight train which was to operate from East Des Moines, Iowa, to Earlham, Iowa, thirty-two miles distant, and return (see R. 28-29). Respondent went to work about 11:30 A.M. The train had some 10 or 11 freight cars out of East Des Moines and picked up and set out cars at West Des Moines and Booneville (R. 13). The next station was Van Meter, a small town some twenty miles west of Des Moines. Respondent was instructed to procure the switch list from the station agent at Van Meter and to help the head end brakeman in the station work there (R. 12-13).

After leaving Booneville, respondent rode in an empty box car at the head end of the train. As the train neared Van Meter and slowed down to about two miles an hour, respondent sat down in the open doorway of the box car with his feet hanging out the car, preparing to alight on the platform in front of the Van Meter depot (R. 13). When the car reached a point about opposite the depot, respondent placed his weight on his hands and raised himself up. The Van Meter station platform is composed of brick with a cement curb next to the southerly rail of the main line, which is some six or seven inches wide (R. 13). Respondent identified Exhibits "A" (reproduced R. 15), "B" (reproduced R. 17), "C" (reproduced R. 19), and "D" (reproduced R. 21) as correctly showing the condition of the station platform at the time of his alleged injury. Petitioners' Exhibits 6 (reproduced R. 35), 7 (reproduced R. 37), 8 (reproduced R. 51), and 9 (reproduced R. 53) show conditions substantially identical with respondent's exhibits.

Respondent first described the manner of his alleged injury as follows:

> "And there was an awful surge of the train which threw me out, and I caught my foot in a crack in the curb there and slipped with my left foot, and it threw me and I lit on my left shoulder and side on the platform" (R. 13).

Respondent further said on direct examination that his foot was caught in the curb at the point where there was a break (R. 18). On cross examination, respondent testified:

> "I told Mr. Michel (respondent's counsel) the train was only going about two miles an hour when this thing happened. That would be only a little bit more than barely moving. I was used to getting on and off freight trains moving at considerably greater speeds than two miles an hour. There was a hard surge ahead at that time and back a little" (R. 30).

In reporting the occurrence of his alleged injury to the trainmaster's clerk at Des Moines, Iowa, on the day following his fall, respondent signed the following written statement:

> "I do not blame anyone for this accident. I simply slipped on the glazed brick platform as I got down from this car. The platform was dry and in normal condition." (See petitioners' Exhibit 1, reproduced R. 41 and 42).

Respondent also signed a medical report at about the same time, in which, in response to a question as to the manner in which his alleged injury occurred, stated:

> "While getting off a freight car slipped on brick platform, fell, and injure left shoulder, arm and left chest." (See petitioners' Exhibit 4, reproduced R. 47).

On September 23, 1943, respondent made a detailed report to petitioners' claim agent, in which he said:

> "As the train was coming to a stop at water tank at Van Meter and train still moving possibly two or three miles per hour, fireman had gotten off engine and was on the ground, I sat down in the doorway of the box car on the station platform side and with this car opposite the brick platform, towards the west end, with my hands on the floor of the box car I jumped out onto the platform and struck on the brick platform, and because of the slick condition of the bricks my feet slipped on platform, causing me to fall, striking on my left side, shoulder and arm" (R. 65).

Being recalled for further direct examination by his counsel, respondent testified:

> "I did not tell the claim agent that 'I jumped out onto the platform and struck on the brick platform and because of the slick condition of the bricks, my feet slipped on the platform.' I told him I was jerked out." (R. 71)

Respondent claimed to have suffered an injury to his spine as the result of his fall, and after being examined by numerous physicians in Des Moines, Iowa, Chicago, Illinois, and at several points in Texas, went to the Mayo Clinic at Rochester, Minnesota, where an operation was performed for the removal of a herniated disk between the fourth and fifth lumbar vertebrae on July 14, 1944.

There was no evidence that the broken portion of the platform curb was any higher than the unbroken portion. The distance from the southerly edge of the rail to the northerly edge of the curb was 25 inches at the point where the slab was displaced toward the rail, and 28¼ inches where the curb was upright in a vertical position (R. 79). The approximate overhang from the outside edge of the rail to the outside edge of a box car is 27½ inches (R. 79, R. 84, R. 86). Respondent alleged negligence on the part

of petitioners in two respects: (1) In failing to furnish respondent a reasonably safe place to work by reason of the broken, defective, and uneven condition of the platform curb; (2) in negligently operating the train so as to cause same to be jerked as respondent was about to jump from the freight car. The trial court, upon petitioners' motion, withdrew from the consideration of the jury the second specification of negligence predicated upon the alleged jerking of the train (R. 76), and submitted the case to the jury on the single allegation that petitioners were negligent in that they failed to provide respondent a reasonably safe place in which he could do his work "in that they kept, maintained, and allowed a certain platform at said station at Van Meter, Iowa, to be in a defective, dangerous, and uneven condition, and allowed depressions to remain therein" (R. 105). The jury returned a verdict of $13,056 for respondent (R. 116).

The Eighth Circuit Court of Appeals affirmed the trial court and held that jury issues were presented both upon the question of petitioners' negligence and upon the issue of proximate cause. The opinion is reported in 164 Fed. (2d) 65. With respect to the condition of the platform curb, the Court said:

> "But even if it could be declared that the platform was reasonably safe for such ordinary uses as walking, trucking and other general depot purposes (which we need not determine), it would not therefore follow that it also was reasonably safe for the more hazardous use as a facility in allowing trainmen to alight from moving cars. And the trustees' duty under the Federal Employers' Liability Act was to exercise reasonable care to try to make the platform generally safe for all the uses for which it was intended or permitted to be a facility in the course and scope of its employees' duties.
>
> Whether the defect in the curb (which had existed for several years) was such as was reasonably likely

to become a factor in causing an injury to an alighting trainman and so should have been corrected was a question that was within the province and competence of the jury to decide. Under the expressions and indications in the recent decisions of the Supreme Court, there is no right on the evidence to regard it as an absolute, which was entitled to be disposed of as a matter of law. See e. g. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 33, 64 S. Ct. 409, 411, 88 L. Ed. 520; *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916. Cf. also *Chicago & N.W. R. Co. v. Grauel*, 8 Cir., 160 F. 2d 820. The earlier cases, such as *Delaware, L. & W. R. Co. v. Koske*, 279 U.S. 7, 49 S. Ct. 202, 73 L. Ed. 578, *Missouri Pac. R. Co. v. Aeby*, 275 U.S. 426, 48 S. Ct. 177, 72 L. Ed. 351, and *Nelson v. Southern Ry. Co.*, 246 U.S. 253, 38 S. Ct. 233, 62 L. Ed. 699, upon which the trustees rely, may not be read apart from these later decisions. Perhaps, also, the concept of negligence in the earlier cases and the court's admeasurement of the duty owed therein can be said to have contained some unconscious or other subtractings, from the interplay of the then-existing doctrine of assumption of risk.

What we have said as to the sufficiency of the evidence to constitute a jury question on negligence is controlling also of the trustees' argument that there was no basis for allowing the jury to decide whether the defect in the curb was the cause of plaintiff's fall and injury. Plaintiff's testimony was that he was sitting in the doorway of the front box car of the train, with his feet hanging out, holding the weight of his body on his hands, preparatory to jumping onto the station platform, when a jerk of the train caused him to be pulled forward out of the car. He did not undertake to claim on the evidence that the jerk was of a character that entitled him to rely on it as negligence, and it therefore was permitted to be treated as being only such a jerk as ordinarily would occur in the slowing down and stopping of any freight train.

The trustees say, however, that on this testimony it would have to be held that the non-negligent jerk of the train was the proximate cause of the accident. But this fails to take into account plaintiff's further testimony, to the effect that as he came in contact with

the platform he caught his foot in the break in the curb and was thrown down onto the brick surface. On this testimony, it clearly was for the jury to determine whether the break in the curb had caused or contributed to plaintiff's fall. Cf. *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 578, 579, 65 S. Ct. 421, 423, 89 L. Ed. 465; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 33, 34, 64 S. Ct. 409, 412, 88 L. Ed. 520. If the jury found that it had, then legally it was a proximate factor in the accident. The Federal Employers' Liability Act gives a right of recovery whether the negligence of the employer is in whole or only in part the cause of an employee's injury. 45 U.S.C.A. Sect. 54." (R. 135, R. 136, R. 137)

JURISDICTION.

1. The jurisdiction of this court to review the judgment below is expressly provided for by Judicial Code, Section 240, as amended by the Act of February 13, 1925. This cause originated in the United States District Court for the Southern District of Iowa, and a judgment adverse to petitioners was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit.

2. The date of the judgment sought to be reviewed is October 27, 1947.

THE QUESTIONS PRESENTED.

The questions presented by the decision below may be summarized as follows:

1. Under the Federal Employers' Liability Act, is a railway company required to maintain a station platform, upon which trainmen alight from trains in the performance of their duties, in safer condition than for general and ordinary uses such as walking, trucking, and other depot purposes?

2. In view of respondent's repeated testimony that he was "jerked" from the car by the movement of the train,

could the jury properly find that the depot platform was the proximate cause of respondent's fall and injury?

3. Was the Circuit Court of Appeals for the Eighth Circuit justified in ruling, as a matter of law, that the evidence was legally sufficient to support a finding that respondent's injuries were the proximate result of actionable negligence on the part of petitioners?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law arising under the Federal Employers' Liability Act in a manner directly in conflict with the applicable decisions of this court. The decision of the Circuit Court of Appeals for the Eighth Circuit in this case rendered petitioners insurers of the safety of employees who have occasion to alight from trains upon a station platform, for the opinion inferentially concedes that the station platform was not in a condition which would have justified a finding of negligence as to the general public.

2. The Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law arising under the Federal Employers' Liability Act in a manner contrary to the prior decisions of this court in that it holds that although respondent repeatedly testified that he was "jerked" from the car by the lurching of the train, the alleged defect in the station platform may be by the jury found to be a proximate cause of respondent's injuries.

3. The Circuit Court of Appeals for the Eighth Circuit, in holding that jury issues as to negligence and proximate cause are presented by the record in this case, has rendered a decision upon an important question of Federal law arising under the Federal Employers' Liability Act directly in conflict with the decisions of other Circuit

Courts of Appeal, and with long-established principles governing actions instituted under the Federal Employers' liability Act.

A certified copy of the record in said suit in United States Circuit Court of Appeals for the Eighth Circuit, including the record, proceedings, opinion, and disposition of the cause had in said court, is herewith furnished and lodged in the office of the Clerk of this Court in compliance with Rule 38 of the rules of this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record and all of the proceedings had in the case numbered and entitled on its docket as "No. 13562—Civil, Joseph B. Fleming and Aaron Colnon, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, Appellants, vs. Everett E. Husted, Appellee;" and that the said opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Court and remanded for further proceedings, and that petitioners have such other and further relief in the premises as to this Court may seem meet and just.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

By Ralph L. Read,
Alden B. Howland,
Des Moines, Iowa,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

Under the Federal Employers' Liability Act, there must be a showing of actionable negligence on the part of defendant amounting to more than a mere scintilla before a cause may properly be submitted to the jury. In the case at bar, the evidence was insufficient to justify a finding that petitioners violated any duty which they owed to respondent. The Circuit Court of Appeals for the Eighth Circuit should, therefore, have reversed the case on the ground that there was no showing of actionable negligence.

Brady v. Southern Ry. Co., 320 U.S. 476, 88 L. Ed. 239.
Ellis v. Union Pacific R.R. Co., 91 L. Ed. (Adv. Sheets) 433 (decided Feb. 3, 1947).
Nelson v. Southern Ry. Co., 246 U.S. 253, 62 L. Ed. 699.
D.L. & W. R.R. Co. v. Koske, 279 U.S. 7, 73 L. Ed. 578.
Mo.-Pacific R.R. Co. v. Aeby, 275 U.S. 426, 72 L. Ed. 351.
McGivern v. Northern Pacific Ry. Co., 132 Fed. (2d) 213, (C.C.A. 8th).
Sullivan v. C. & N.W. Ry. Co., 258 N.W. 38 (Neb.).
Peters v. Tennessee Central Ry., Inc., 167 S. W. (2d) 973 (Tenn.).
Raudenbush v. Baltimore & Ohio R.R. Co., 63 Fed. Supp. 329.

II.

In order to justify a finding that a particular act or omission is the proximate cause of an injury, it must af-

firmatively appear that the injury is the natural and probable consequence of the wrongful act or omission, and that injury therefrom ought to have been foreseen in the light of all the attending circumstances.

Brady v. Southern Ry. Co., 320 U.S. 476, 88 L. Ed. 239.

Ellis v. Union Pacific R.R. Co., 91 L. Ed. (Adv. Sheets) 433 (decided Feb. 3, 1947).

ARGUMENT.

I.

Upon the trial of this cause, petitioners, by motions for an instructed verdict, made at the close of respondent's evidence and renewed at the close of all the evidence, and by motion for new trial after verdict, challenged the sufficiency of the evidence to show actionable negligence on their part. The trial court held the evidence sufficient to show actionable negligence with respect to the condition of the Van Meter depot platform, and this ruling was upheld by the Eighth Circuit Court of Appeals in an opinion in which, inferentially at least, it is conceded that no defect or insufficiency in the station platform existed, which would have made it unsafe for the usual and ordinary uses of such a facility, but that the condition of the platform justified a finding of negligence in favor of respondent because he was permitted, in the performance of his duty as a freight train brakeman, to alight upon such platform. In other words, the Eighth Circuit Court of Appeals holds that while a depot platform may be entirely safe and adequate for the uses for which such platform was primarily designed, nevertheless one for whose primary benefit and use the platform was not erected is entitled to demand, with respect to the maintenance of same, a greater degree of care than the classes of persons for

whose use and benefit the same was initially provided.

Both respondent and petitioners introduced in evidence photographs of the Van Meter station platform, which, they concede, correctly disclose the condition of the same when respondent claims to have been injured on June 23, 1943. These photographs disclose no substantial conflict and are mutually complementary in that some of them show portions of the platform not disclosed by the photographs introduced by the other party. It was undisputed that the concrete curb at the northerly edge of the station platform next to the track was broken in places and was in some places unevenly displaced toward the southerly rail of the track upon which the train was moving. Where the curb was displaced, the distance between the southerly rail and the northerly edge of the curb was 25¼ inches, and where the curb was upright, the distance was 28 inches. There was no showing that the displaced curb was any higher than the other portions thereof. It was conceded, also, and shown without dispute that box cars extend approximately 27½ inches beyond the outer edge of the rail upon which they are standing or moving. It is, therefore, established without dispute that where the curb was displaced toward the rail, its northerly edge was under the overhanging portion of the freight car, and that where the curb was upright, the outer edge of the box car was approximately even with the curb.

Respondent testified that when the speed of the train had been reduced to about two miles per hour, he placed his weight on his hands, and was about to jump from the car onto the platform when a severe lurch or jerk of the train occurred. This threw him out and he lost control of his movements. As he fell, he claims to have caught his foot in the broken portion of the curb. It is upon these facts, and no others, that the rulings below were predicated.

Respondent's fall occurred upon a clear warm day in midsummer. In reporting his alleged injury, respondent repeatedly stated that he jumped from the box car to the station platform, slipped on the bricks, and fell. It may be conceded, of course, that the jury was entitled to believe respondent's story as told on the witness stand, and to reject his account as reported to his employer on numerous occasions immediately following the occurrence. But if this be conceded, the question remains whether the record contains evidence of actionable negligence on the part of petitioners as to respondent sufficient to sustain an award of damages.

In this case, respondent was not required, as in many of the cases which have come to this Court, to perform his work under inherently hazardous conditions. Neither is there any claim that respondent was compelled to alight from the train before it came to a stop. Respondent's fall, under the rulings of the two courts below, was clearly occasioned by his own act, coupled with the alleged lurching or surging of the train which, it was conceded, did not constitute an independent ground of negligence. Respondent was placed in no position of hazard other than that inherent in working as the member of a crew of a moving train. In this respect, the case is clearly distinguishable from all of the cases cited in the opinion of the Eighth Circuit Court of Appeals.

This Court, as presently constituted, has repeatedly said that in cases arising under the Federal Employers' Liability Act, a liability is imposed only when the employer has been negligent, and that the employer is in no sense an insurer of his employee's safety. Thus, in *Brady v. Southern Ry. Co.*, 320 U.S. 476, 88 L. Ed. 239, this Court, speaking by Mr. Justice Reed, said:

> "The weight of the evidence under the Federal Employer's Liability Act must be more than a scintilla

> before the case may be properly left to the discretion of the trier of fact—in this case, the jury. (Citing cases) When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict, or otherwise, in accordance with the applicable practice, without submission to the jury, or by judgment notwithstanding the verdict."

In *Ellis v. Union Pacific Ry. Co.*, 91 L. Ed. 433 (decided February 3, 1947), you said:

> "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur and that negligence must be 'in whole or in part' the cause of the injury."

The facts in this case are fairly comparable with those disclosed in *Nelson v. Southern Ry. Co.*, 246 U.S. 253, 62 L. Ed. 699, in which the opinion of this court was delivered by Mr. Justice Brandeis, considered as one of the greatest liberals who has occupied a position upon this Court. There, the employee, a civil engineer, was making a survey in a railroad yard. In doing so, he walked along the main track and stepped upon a tie, a small piece of which was decayed to the extent that it slivered off under his weight, and he fell to the ground and sustained a knee injury. Upon such facts, Mr. Justice Brandeis, speaking for this Court, said:

> "Upon these facts Nelson sought in a state court of North Carolina to recover damages from the railway under the Federal Employers' Liability Act. The trial court refused defendant's motion for a nonsuit, and the jury rendered a verdict for plaintiff. Judgment thereon was reversed by the Supreme Court of the state on the ground that there was no evidence of negligence; and the case came here on writ of error.

It is clear that the defendant did not fail in any duty which it owed to the plaintiff.

Judgment affirmed."

The station platform at Van Meter, Iowa, was not built primarily to provide petitioners' trainmen with a surface upon which they might jump from moving trains. It was constructed to facilitate the transportation of passengers and freight and to provide passengers with a facility to serve them. While the Eighth Circuit Court of Appeals, in its opinion, holds that it does not determine whether the platform was sufficient for all usual purposes, it does say that even if perfectly sufficient and safe as a depot facility, that, nevertheless, petitioners might be found guilty of actionable negligence because respondent was permitted to alight on the station platform in the performance of his work as a freight train brakeman. We submit that the logic of the Circuit Court of Appeals cannot be sound. Respondent, in his evidence, conceded that he was used to alighting on all types and kinds of surfaces in the performance of his work. The presence of the depot platform, itself, certainly presented no hazard to respondent, and certainly did not increase the danger of his injury. How, then, can it be said that the failure to maintain the curb of the station platform in perfect alignment constituted actionable negligence as to Everett E. Husted?

To hold, as did the Circuit Court of Appeals, that petitioners are under a greater measure of care with respect to the condition of station platforms because trainmen are permitted to alight thereon than would apply in the case of a member of the general public, finds no support in the prior pronouncements of this or any other court. The doctrine that a railway employee under the Federal Employers' Liability Act is entitled to exact a higher standard of maintenance than would the persons for whose

primary use and benefit a particular facility was constructed, is, indeed, novel, and cannot stand logical analysis. Such a rule merely makes of petitioners and other employers under the Federal Act, insurers of the safety of their employees, a duty which this Court has repeatedly said that the Federal Act does not impose.

It must be borne in mind, also, that the point at which the broken curb was located was directly beneath the outer edge of the box car in which respondent was riding. A brakeman alighting from a freight train would ordinarily step or jump completely over the curb and alight upon a portion of the platform a considerable distance beyond the curb, itself. This is exactly what petitioners' station agent, who testified as a witness, says actually occurred. (See R. 89) To hold that petitioners may be found by a jury to have been guilty of actionable negligence for failure to keep in perfect repair a portion of the platform curb with which no one would ordinarily have any occasion whatever to come in contact, again demonstrates that what the Circuit Court of Appeals for the Eighth Circuit has done is merely to hold that petitioners, at the whim of a jury, may be constituted the insurers of the safety of their employees. This, we again point out, is directly contrary to the prior pronouncements of this court in very recent months.

Unless employers under the Federal Act are to be constituted as the insurers of the safety of their employees, unless the Federal Act may be converted from a law dealing with liability for common law negligence and fault into a workmen's compensation measure, we submit that the decision of the Circuit Court of Appeals in this case is wrong, that it is contrary to the prior pronouncements of this court, and that that court has so far departed from the customary and accepted rules of law governing such matters that this Court should exercise its broad super-

visory powers for the correction of a manifest error in the administration of the statute. In the very nature of things, injuries will, and are being sustained by railway employees where neither party can be said to be at fault. In other instances, employees do, and will suffer injury from the result of their own actions. In such cases, this Court has consistently held that, under the law, as written, there can be no recovery of damages. We believe that this case is a perfect illustration of an injury suffered by a railway employee solely through his own acts and without the intervention of any actionable negligence on the part of his employer. To adopt the tenuous theory of the Eighth Circuit Court of Appeals, as disclosed in the opinion below, violates the rule which this Court has laid down and uniformly followed. This Court, we recognize, has been liberal in the application of the Federal Act to railroad employee injury cases. We submit, however, that this Court has neither made nor intended to make, the Federal Act into a workmen's compensation statute. Viewed in this light, we believe that the decision of the Eighth Circuit Court of Appeals is manifestly erroneous, and should be reversed.

II.

Respondent testified that as he was preparing to jump from the box car in which he was riding and while he had the weight of his body upon his hands, resting upon the floor of the car, a surge or jerk occurred, which threw him from the car to the station platform. He testified that as he fell, his foot caught in the platform curb. He, of course, would have fallen, irrespective of the condition of the curb. He repeatedly says that he was "jerked out" of the box car in which he was riding by the lurching of the train. Under these circumstances, it seems to us quite clear that the lurching or surging of the train

was the direct and proximate cause of respondent's fall. It was the fall which respondent claimed produced the injuries for which he was awarded damages.

The Eighth Circuit Court of Appeals held, under these facts, that a jury might find that the condition of the curb was a proximate cause of respondent's injury, merely because under the statute negligence "in whole or in part" is made the basis of recovery by the Act. The floor of the box car was approximately four feet above the station platform. Respondent testified that he was "jerked out of the car." If so, he must have completely lost control over his movements and would have fallen upon the station platform irrespective of the broken condition of the platform curb.

Viewed in a slightly different light, it appears quite clear that the direct cause of respondent's fall was the jerking or lurching of the train. The jerking of the train, under respondent's evidence, was the cause which produced the fall, and it is not claimed that but for the broken condition of the curb, the fall would not have occurred. Respondent's counsel conceded, and the trial court ruled, that the jerking of the train did not constitute actionable negligence. Accordingly, it was withdrawn from the jury as a ground of recovery. Here, respondent did not testify to any facts whatever from which the jury might conclude that the severity of his fall was increased by, or that his injury would not have occurred but for, the broken condition of the platform. We say, therefore, that under this record the jury could not find that the broken condition of the platform curb was a proximate cause of the injuries. The injuries, if respondent sustained them, were produced by the fall, and the fall was directly caused when, as respondent, himself, says, he was "jerked out of the car." It seems clear, therefore, that in this respect, no jury issue was presented and that the Circuit Court of Ap-

peals has erred in affirming the judgment of the trial court.

The Eighth Circuit Court of Appeals has, we submit, wholly disregarded fundamental principles of law governing the liability of employers under the Federal Employers' Liability Act. Indeed, if it may be said that actionable negligence as to respondent is disclosed by the record in this case, it is difficult to conceive of any factual situation under which it might properly be said that a railway employer is entitled to an instructed verdict on the ground that no negligence is disclosed.

Manifestly, the depot platform was not constructed for the use or benefit of respondent. Had there been no platform at all at the point in question, petitioners would have been guilty of no actionable negligence. It cannot well be contended that the presence of the platform increased the hazard of respondent's employment. How, then, can it be said that petitioners violated any duty which they owed to respondent to provide him a reasonably safe place in which to perform his work?

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers over the judgments of Circuit Courts of Appeal. In order that the errors committed by the Eighth Circuit Court of Appeals may be corrected, and that petitioners may have the benefit of the rights to which they are entitled under the Federal Employers' Liability Act, a writ of certiorari should be granted; this Court should review the decision of the Eighth Circuit Court of Appeals and finally reverse it.

Respectfully submitted,

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ALDEN B. HOWLAND,

Attorneys for Petitioners.